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NO. 82-840

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

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LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,

Petitioner,

-vs-

JAMES DUPREE HENRY,

Respondent.

==========

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

RICHARD L. JORANDBY
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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, JAMES DUPREE HENRY, respectfully opposes the petition for a writ of certiorari filed November 17, 1982 by petitioner, Louie L. Wainwright, seeking review of the decision of the United States Court of Appeals for the Eleventh Circuit in this case. This brief in opposition is filed pursuant to Rule 22.1 of the Rules of this Court.

STATEMENT OF THE CASE

The pertinent facts of this case are set forth in the opinion of the Court of Appeals appended to the petition for a writ of certiorari. 53a to 62a.

REASONS THAT THE WRIT SHOULD BE DENIED

Following this Court's remand of June 14, 1982 (__U.S.___, 102 S.Ct. 2922), the Court of Appeals did exactly as directed. It painstakingly reviewed its earlier decision and the whole record in the light of Engle v. Isaac, 456 U.S. ___, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982), and concluded that the present case was altogether different from Engle.

The issue in Engle had to do with the federal habeas corpus consequences of a state appellate decision that the habeas petitioner had forfeited his federal claim by failing to raise it through any objection at all at his criminal trial. The issue in the present case concerns the sufficiency of the objection made by Henry's counsel at his criminal trial. The Court of Appeals held, alternatively, that (1) the objection was sufficient under Florida procedure, and (2) the Florida Supreme Court had not in any event, held Henry's federal constitutional contention forfeited for non-objection. See Appendix to Petition for Certiorari [hereinafter cited as "App."] 52a-66a. Hence, it reached the merits under Lefkowitz v. Newsome, 420 U.S. 283 (1975). See App. 57a.

This holding was plainly correct. County Court of Ulster County v. Allen, 442 U.S. 140 (1979). "In contrast to Isaac we did not deal [in Henry] with a claim that was forfeited before the state courts" App. 52a. "The futility of further objection by Henry was the standard by which procedural defaults could be assessed under state law ... we were not stating [in the earlier

opinion] that futility would constitute cause for a failure to object at trial under the Sykes cause and prejudice test, thus Isaac does not affect our analysis on that point." (Emphasis supplied) App. 61a n. 3.

* * *

Petitioner seeks to make this case a colorable candidate for certiorari simply by misrepresenting what the Court of Appeals held. Petitioner's "Questions Presented" are not in fact presented by the decision below; rather, they are invented by lifting bits of the Court of Appeals' opinion out of context.

(1) Question I purports to ascribe to the Court of Appeals a general "holding that where state courts' opinions do not make it clear that a point is not passed upon due to failure to preserve it by timely objection, the state must be presumed to have applied its own rules to reach and reject the claim on the merits." Petition for Certiorari [hereinafter cited as "Pet."] i. What the Court of Appeals actually wrote, in one of its alternative grounds, was that "[i]n the situation presented here, where the state courts' opinions do not make it clear that a point is not passed upon due to failure to preserve it by timely objection, the state must be presumed to have applied its own rules to reach and reject the claim on the merits." App. 63a-64a.

The "situation presented here," to which the Court of Appeals refers in the passage conspicuously omitted by petitioner, was the unusual situation in which a state appellate court manages to affirm a conviction and death sentence without ever stating anywhere in its opinion any of the issues raised by the condemned appellant and considered by the court. See App. 1a-11a. As the

Court of Appeals noted, "[t]he Florida Supreme Court's opinion in Henry's direct appeal does not list or describe any of the errors Henry asserted." (Emphasis by the Court) App. 55a. In this situation, it beggars the imagination to conceive of any other way in which the Court of Appeals might have gone about deciphering the meaning of the Florida Supreme Court's unexplained pronouncement that "we find no reversible error is made to appear" (App. 10a; see App. 57a-58a) than by reading the language on the assumption that the Florida Supreme Court followed its own rules in reaching the merits.[1/] Cf. Smith v. Digmon, 434 U.S. 332 (1978).

However, the Court of Appeals did not rest at even that. Instead, it reviewed the Supreme Court of Florida's opinions on direct appeal and collateral review (App. 53a-55a, 57a-59a) in the light of the entire record -- defense counsel's objections at trial (App. 59a-60a), the trial judge's ruling on that objection (App. 60a), the briefs on Henry's direct appeal (App. 55a-56a), the

---

[1/] Thus there is no support for petitioner's claim that the Florida Supreme Court must have found a procedural default since Florida has no contemporaneous objection rule for capital penalty trials [See, e.g.) Elledge v. State, 346 So.2d 998 (Fla. 1977) (reversing sentence for introduction of nonstatutory aggravating factors despite the noted lack of objection at trial); Mikenas v. State, 367 So.2d 606 (Fla. 1979) ("In capital cases, it is this Court's responsibility to insure that the trial judge remains faithful to the dictates of Section 921.141, Florida Statutes, in the sentencing process."); Jacobs v. State, 396 So.2d 713 (Fla. 1981) (reversing death sentence despite the fact that appellant briefed no issues regarding the penalty)] and since petitioner never alleged any procedural default in the state courts. There certainly is thus no ambiguity regarding whether the Florida courts reached the merits of the question. Florida has no contemporary objection requirement, no procedural default question was ever raised in state courts, no state court ever found or even inferred a procedural default and indeed the only ruling by a state court on the question found that the objection was sufficient. These facts, of course, distinguish the cases relied upon by petitioner -- Martinez v. Harris, 675 F.2d 51 (2d Cir. 1982) and Ratcliff v. Estelle, 597 F.2d 474 (5th Cir. 1979) -- as well as Engle v. Isaac, supra.

trial judge's findings in state post-conviction proceedings[2/] and their affirmance by the Supreme Court of Florida (App. 61a-62a) -- in quest of any support that could be found for "the inference that Henry defaulted by failing to present the issue in question to the state courts," App. 55a. It found "no support under Florida law or the history of this litigation for the inference that Henry's constitutional claim was decided and rejected on procedural grounds rather than on the merits." App. 65a.

2/ This finding is of particular importance and is ignored by petitioner -- the state court judge ruled that: "Since the trial judge had ruled on this point [consideration of nonstatutory factors], no further objection was required." See App. 62a. Petitioner may be ignoring this holding because it was petitioner that urged that holding on the state court. Petitioner argued in state court that defense counsel "strenuously objected" to the introduction of the nonstatutory aggravating evidence and thus the jury instruction "was the same point [defense counsel] did, in fact, contest at trial." (Record on Appeal at 555). Thus, petitioner successfully argued the sufficiency of the objection in state court and in federal court until the federal court ruled against it on the merits and then petitioner reversed its position to argue the lack of sufficiency of the objection. Such a disingenuous switch of positions should not be condoned.

There is nothing in this particularistic search of a state-court record, nor in its perfectly proper result, to warrant certiorari.[3/]

(2) Petitioner has similarly contrived to create a nonexistent issue in Question III, which purports to be "whether the lower court [erred] in holding that a procedural default in the instant case can be excused because it was determined that the

---

[3/] It also should be emphasized that although petitioner seeks to focus the issue on the jury instruction, the issue in the present case concerns the propriety of jury and judge relying upon an unlimited, unknowable range of nonstatutory aggravating factors in imposing the capital penalty. The issue is thus much broader than the erroneous jury instruction also allowing such reliance. It is the consideration by the judge and jury of nonstatutory aggravating factors that is at issue -- and this also involves the introduction, of the evidence of nonstatutory factors for the jury's consideration the judge's findings and reliance upon nonstatutory aggravating factors, as well as the Florida Supreme Court's reliance upon such factors. And there is no question that this issue regarding the consideration of nonstatutory aggravating factors was fully and completely raised before the state courts, by objection at trial, by briefs to the Florida Supreme Court and by petition for rehearing. Petitioner does not contend differently. The jury instruction also urging the jury to consider the nonstatutory factors that the judge had already ruled (over objection) that it could consider, is thus but a part of the issue in the present case. Therefore, the same point of law is involved and there can be no doubt that the issue was adequately raised in state courts, but even were a procedural default found regarding the jury instruction, it would not affect the overall issue in this case since that issue of the consideration of nonstatutory aggravating factors was fully presented to the state courts. The question regarding the sufficiency of the objection relating to the jury instruction is thus only subsidiary to the issue in this case. Therefore regardless of whether a procedural default were to have occcurred regarding the jury instruction, it would be irrelevant to the issue in this case; the issue would remain because the jury was allowed to consider nonstatutory aggravating factors by the introduction of the evidence (over objection), the judge considered such factors in imposing the death sentence, and the Florida Supreme Court affirmed that reliance by upholding the sentence over respondent's constitutional challenge and that court denied rehearing despite the constitutional challenge to its consideration and affirmance of the unauthorized factors. Petitioner's attempt to focus the issue otherwise is therefore misplaced.

Florida Supreme Court had excused a procedural default in an earlier unrelated case," Pet. i. The "lower court" made no such "holding." As it expressly and succinctly stated:

> The appellant [now Petitioner] asserts that we have circumvented Sykes and Isaac by finding that, in a completely unrelated case, Florida excused state procedural default. To the contrary, we do not mean to suggest that past excuse of a default in another case allows a federal court to excuse a default in a case where the state courts have not. Instead, we have looked to Florida to determine what the state courts have done in the case before us. That is a necessary, accepted analysis in habeas cases."

App. 64a-65a n. 4.

(3) Question II, which purports to go the merits of the constitutional decision below, fares no better. Petitioner is compelled to admit (Pet. 20-21) that the Florida Supreme Court now agrees with the Court of Appeals that the use of nonstatutory aggravating circumstances as the basis for a death sentence is unlawful. Provence v. State, 337 So.2d 783, 786 (Fla. 1976); Purdy v. State, 343 So.2d 4, 6 (Fla. 1977); Elledge v. State, 346 So.2d 998, 1002-1003 (Fla. 1977). As the three cited opinions show, the Florida Supreme Court has, indeed, reached this result through reasoning identical to that of the Court of Appeals below: that the failure to confine the capital sentencing decusion within the channels set by legislative specification of enumerated aggravating circumstances would violate a procedural safeguard necessary "in order to satisfy the requirements of Furman v. Georgia, 408 U.S. 238 ... (1972), [which were carried forward in this Court's subsequent death-penalty decisions including] . . . Proffitt v. Florida, 428 U.S. 242 . . . [(1976)]," Elledge v. State, supra, 346 So.2d at

1003.

So the Florida Supreme Court and the Eleventh Circuit are not in disagreement that it is statutory and constitutional error to present evidence of nonstatutory aggravating circumstances in support of a death sentence. They are in disagreement, petitioner asserts (Pet. 21-23), only with regard to the circumstances under which such error is reversible; and the disagreement is said to arise from the Florida Supreme Court's "Elledge rule," that "the existence of statutory aggravating circumstances in the absence of mitigating circumstances renders unimportant the existence of non-statutory aggravating circumstances, Pet. 22.

Such a disagreement might warrant certiorari in a case involving the Elledge rule -- as it has presumbly already done in Barclay v. Florida, O.T. 1982, No. 81-6908, cert. granted on November 8, 1982 (51 U.S.L.W. 3362). But the present case is not such a case. For the "Elledge rule" applies only where nonstatutory aggravating circumstances are found by a trial judge in support of a death sentence; it does not apply where nonstatutory aggravating evidence is submitted to a jury as the basis for its advisory sentencing recommendation. Maggard v. State, 399 So.2d 973, 977-978 (Fla. 1981).[4/]

4/As the Maggard decision pellucidly demonstrates the Florida "Elledge rule" is irrelevant to this case since it involves errors occurring in the jury sentencing proceedings, not just the trial judge's findings, and in such situations, the state-law cases (decided at the same time as those cited by petitioner) have reversed without any consideration of the "Elledge rule". See, e.g. Messer v. State, 330 So.2d 137, 141-142 (Fla. 1976); Miller v. State, 332 So.2d 65, 67-68 (Fla. 1976).

That is exactly what happened here, and the jury was affirmatively licensed and indeed urged to base a death verdict on such evidence by sentencing instructions which told it that it should consider "statutory aggravating factors plus anything else the jury determines to be aggravating," App. 35a. The Court of Appeals correctly concluded that it needed to look no further than Furman to condemn such a practice, and that neither Elledge nor any other Florida Supreme Court decision insulates the resulting death sentence from invalidation. Petitioner himself does not venture to suggest that the Florida Supreme Court applied the Elledge rule in the present case; to the contrary, he suggests that it did not. Pet. 20-21.

* * *

In short, the issues actually presented in this case do not warrant certiorari, and the "questions" invented by the Petitioner as warranting certiorari are not presented by the case. The writ should be denied.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

BY _____
CRAIG S. BARNARD
Chief Assistant Public Defender

Counsel for Respondent.

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-vs-

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Respondent.

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A F F I D A V I T

This is to certify that I, CRAIG S. BARNARD, a member of the Bar of this Court, deposited Respondent's Brief in Opoosition in the above-styled cause, in the United States mail at the Main Branch of the United States Postal Service, West Palm Beach, Florida on December 23, 1982. However, it was returned to this Office (with 14 cents postage due) on December 28, 1982. Therefore, in order to facilitate the consideration of this cause, the Brief in Opposition was mailed by Express Mail, at the Main Branch of the United States Postal Service on December 28, 1982.

CRAIG S. BARNARD
Chief Assistant Public Defender

Counsel for Respondent.

State of Florida)
County of Palm Beach)

SWORN TO and SUBSCRIBED before me on this 28th day of December, 1982.

Florestine Wilson
Notary Public

My Commission Expires:

Notary Public, State of Florida
My Commission Expires Sept. 23, 1986

NO. 82-840

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JAMES DUPREE HENRY,

Respondent.

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A F F I D A V I T

This is to certify that I, Craig S. Barnard, a member of the Bar of this Court, deposited Respondent's Brief in Opposition in the above-styled cause, in the United States mail, first class postage prepaid, at the Main Branch of the United States Postal Service Office, West Palm Beach, Florida, on December 23, 1982.

CRAIG S. BARNARD
Chief Assistant Public Defender

Counsel for Respondent

State of Florida)
)
County of Palm Beach)

SWORN TO and SUBSCRIBED before me on this 23rd day of December, 1982.

Florestine Wilson
NOTARY PUBLIC
State of Florida at Large

My Commission Expires:

Notary Public, State of Florida
My Commission Expires Sept. 23, 1986
Bonded Thru Troy Fain Insurance, Inc.

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CERTIFICATE OF SERVICE

I, CRAIG S. BARNARD, hereby certify that I am a member of the bar of the Supreme Court of the United States, and that I have served a copy of the Affidavit regarding mailing on counsel for petitioner by depositing same in the United States mail, first class postage, addressed as follows:

Honorable Wallace E. Allbritton
Assistant Attorney General
The Capitol
Room 1502
Tallahassee, Florida 32301

All parties required to be served have been served. Done this 28th day of December, 1982.

CRAIG S. BARNARD
Chief Assistant Public Defender
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

Counsel for Respondent.

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, JAMES DUPREE HENRY, who is imprisoned on Florida's Death Row, asks for leave to file the accompanying Brief in Opposition to the Petition for Writ of Certiorari without pre-payment of costs and to proceed in forma pauperis pursuant to Rule 46 of the Rules of this Court. Respondent proceeded in forma pauperis at all times in the state courts and sought and was granted leave to proceed in forma pauperis in the federal District Court and the Court of Appeals below. This Court granted respondent leave to proceed in forma pauperis in the prior certiorari proceedings (___U.S.___, 102 S.Ct. 2922). Respondent has attached hereto his affidavit in substantially the form prescribed by Fed.R.App.P., Form 4.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

BY _____
CRAIG S. BARNARD
Chief Assistant Public Defender

Counsel for Respondent.

No.

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-v-

JAMES DUPREE HENRY,

Respondent.

==========

A F F I D A V I T

I, JAMES DUPREE HENRY, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am the respondent in the above-entitled case.

2. Because of my poverty, I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I have at all times in this cause in the state and federal courts been declared by the courts to be indigent and allowed to proceed in forma pauperis.

5. I believe that I am entitled to the redress I seek in said case.

6. The nature of said cause is briefly stated as follows:

I was convicted of first degree murder and sentenced to death by the Circuit Court for Broward County, Florida. I appealed the judgment of conviction and the sentence of death to the Florida Supreme Court; that court affirmed the judgments and death sentences. I filed a petition for writ of habeas corpus pursuant to 28 U.S.C. §2254 in the United States District Court, Middle District of Florida. Habeas corpus relief was granted by the District Court which ordered that a new hearing be held. Petitioner appealed that order to the Court of Appeals, Fifth Circuit, which affirmed the order of the District Court. Petitioner Wainwright then sought certiorari in the Court and certiorari was granted and the decision of the Fifth Circuit was vacated and remanded. The Fifth Circuit then issued its opinion reaffirming its prior decision. Petitioner Wainwright now is again petitioning for certiorari in this Court.

I swear that the above is true and correct.

JAMES DUPREE HENRY

N P SEAL

Sworn to and subscribed
before me this 1 day of
Dec, 1982.

Notary Public
My commission expires:
NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires Oct. 4, 1985

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Respondent.

CERTIFICATE OF SERVICE

I, CRAIG S. BARNARD, hereby certify that I am a member of the bar of the Supreme Court of the United States, and that I have served copies of Respondent's Brief in Opposition, Motion for Leave to Proceed in Forma Pauperis and the Affidavit in the above case on counsel for petitioner by depositing same in the United States mail, first class postage, addressed as follows:

Honorable Wallace E. Allbritton
Assistant Attorney General
The Capitol
Room 1502
Tallahassee, Florida 32301

All parties required to be served have been served. Done this 23rd day of December, 1982.

CRAIG S. BARNARD
Chief Assistant Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
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